No. 22443

In the

United States Court of Appeals

For the Ninth Circuit

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Appellant,

vs.

NELSON CHRISTIAN DORR and AEDA DORR, his wife, surviving parents of FELIX MATTHEW DORR, deceased, et al.,

Appellees.

Brief of Appellees Nelson Christian Dorr and Aeda Dorr

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STATUTE

§ 28-1170, A.R.S. 3

TEXT

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JURISDICTION

Jurisdiction is conceded.

STATEMENT OF THE CASE

Inaccurate and contested, but conceded for purposes of this argument only.

ARGUMENT OF THE CASE

1. The Appellant is barred and precluded from this appeal by virtue of an express stipulation made in open

court. See Reporter's Transcript of Proceedings, dated June 12, 1967, at Pages 4, 6, 7 and 10. Counsel of Appellant stated during the hearing of Appellees Dorr's Motion for Summary Judgment, at Page 10, Line 20 through 24:

> "Mr. Rosengren is entitled to be paid by Allstate if Chenoweth versus Sandoval stands as it is now written.
>
> "So we are not talking about delaying Mr. Rosengren's rights if Chenoweth stands, because we will pay him immediately."

The Rehearing of *Sandoval v. Chenoweth,* 102 Ariz. 241, 428 P.2d 98, was denied on July 6, 1967.

2. The constitutionality of the Financial Responsibility Law of Arizona has been upheld in a number of cases, and artful distinctions between "motor vehicle liability policy," "certified policy," etc., or other artful terms or distinctions cannot defeat the purpose of the Act.

3. The purpose and import of the "entire automobile financial responsibility law is liberally construed to foster its main objective of giving 'monetary protection to that ever changing and tragically large group of persons who while lawfully using the highways themselves suffer grave injury through the negligent use of those highways by others.' " *Sandoval v. Chenoweth,* supra, at page 244.

4. In the Reporter's Transcript of Proceedings dated June 12, 1967, counsel for Appellant conceded its obligation to pay the judgment and agreed to pay the judgment forthwith upon denial of the Rehearing in *Sandoval v. Chenoweth,* supra. That stipulation has been breached and the Appellant has reneged on a solemn obligation and commitment made in open court. Such conduct is reprehensible, should not be tolerated, and the Appellees Dorr should have judgment forthwith and punitive sanctions should be taken by this court against the Appellant.

5. *Jenkins v. Mayflower Insurance Exchange,* 93 Ariz. 287, 290, 291, 380 P.2d 145 (1963), makes the omnibus clause prescribed in the Financial Responsibility Act of Arizona as a part of every motor vehicle liability policy in passing upon the constitutionality of the Financial Responsibility Law, and the Court said therein:

> "Where the basis upon which this act has been declared constitutional is, 'preventing financial hardship and possible reliance upon the welfare agencies,' we cannot constitutionally allow artful distinctions between 'motor vehicle liability policy,' 'automobile liability policy' or 'policy of insurance' to defeat the purpose of the act. To do so would make our opinion in Schecter v. Killingsworth, supra, a sham."

6. The constitutionality of the Act was likewise challenged in *Carpenter v. Superior Court in and For Maricopa County,* 101 Ariz. 565, 422 P.2d 129 (1967), and it was more recently challenged in *Sandoval v. Chenoweth,* supra, at page 244, wherein the Court said:

> "In the absence of any showing of injustice or a legislative change of public policy, we find no reason to depart from the established law of the state and the doctorine of stare decisis. The social and economic problems arising from the ever mounting casualty rate on our streets and highways are even more persuasive today than at the time of the enactment of the financial responsibility law or the decision in Mayflower."

The Court also in *Sandoval v. Chenoweth,* supra, at page 244, reaffirmed its holding in *Jenkins v. Mayflower Insurance Exchange,* supra, and said:

> "Under the rule expressed in Mayflower, the provisions of the Financial Responsibility Law are applicable to the facts of the instant case whether or not the policy would be technically classed as a 'certified' policy. A.R.S. § 28-1170 expressly states as follows:

'F. Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

'1. The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute when injury or damage covered by the motor vehicle liability policy occurs. The policy may not be canceled or annulled as to such liability by an agreement between the insurance carrier and the insured after the occurrence of the injury or damage, and no statement made by the insured or on his behalf *and no violation of the policy shall defeat or void the policy.*' [Emphasis Added.]

"In the light of the Mayflower decision, the foregoing statutory provision is controlling in the instant case."

7. Since Arizona law treats all of these policies the same, the following quotation from 83 A.L.R.2d 1104 is controlling as the law of the case, wherein the annotator sums up the cases as follows:

"It has been universally held or recognized that an insurer issuing an automobile liability policy pursuant to any of the various statutory plans designed to protect the public against the inability to collect damages in tort from financially irresponsible owners or operators of motor vehicles, cannot escape liability to a third party injured through the culpable operation of the vehicle insured, during and within the coverage afforded, because of any fraud or misrepresentations relating to the inception of the policy which might have afforded the insurer a cause for rescinding, reforming, canceling ab initio, or otherwise avoiding an ordinary, voluntary liability policy, so as to escape such liability."

8. The Appellant cites in its Opening Brief the case *State Farm Mutual v. Butler,* (Va.) 125 S.E.2d 823, but

Virginia makes a distinction between "certified" and "non-certified" policies, and this distinction is clearly pointed out in the case of *Virginia Farm Bureau Mutual Insurance Company v. Saccio,* 204 Va. 769, 133 S.E.2d 268 (1963), which clearly makes the difference in fixing absolute liability, as was stated by the Court at page 276:

> "As has been previously noted, the legislature has clearly expressed such an intention with respect to certified policies issued pursuant to the Safety Responsibility Act. If, following certification of a policy issued under the Act, loss or damage covered thereby occurs, the liability of the carrier to the insured is absolute."

9. The current attitude of the Supreme Court of Arizona and the current posture of the law as regards the constitutionality of the Arizona Financial Responsibility Act is reflected in an opinion filed May 8, 1968, in the case entitled:

> "Harleysville Mutual Insurance Co., a corporation,
>
> Appellant,
>
> v.
>
> Franklin Stanley Clayton and Irene E. Clayton, his wife; and Henry Espinoza and Catherine Espinoza, his wife; Noel Thomas, individually and Noel Thomas, as Guardian ad Litem for Willis Thomas and Karen Thomas, minors; and Patricia E. Thomas, his wife,
>
> Appellees.

and for the Court's convenience is attached herein as Appendix A.

CONCLUSION

1. The appeal is frivolous and barred because of the breached stipulation, and punitive sanctions against the Appellant should be invoked.

2. The appeal is without merit on the law, and the judgment of the District Court should be upheld.

Respectfully submitted,

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Attorney for Appellees

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KENNETH ROSENGREN

(Appendix A Follows)

Appendix A

In the Supreme Court of the State of Arizona

In Division
No. 8607

Harleysville Mutual Insurance Co., a corporation,

Appellant,

vs.

Franklin Stanley Clayton and Irene E. Clayton, his wife, and Henry Espinoza and Catherine Espinoza, his wife; Noel Thomas, individually and Noel Thomas, as Guardian ad Litem for Willis Thomas, and Karen Thomas, minors; and Patricia E. Thomas, his wife,

Appellees.

Appeal from the Superior Court of Maricopa County
Honorable Charles C. Stidham, Judge

AFFIRMED

Filed May 8, 1968

TREW & WOODFORD
by R. R. Woodford—Phoenix
Attorneys for Appellant

James E. Grant—Phoenix
Attorney for Appellees Clayton

Gordon G. Aldrich—Phoenix
Attorney for Appellees Thomas

McFarland, Chief Justice:

Noel and Patricia Thomas filed suit in the Superior Court of Maricopa County for personal injuries sustained in an

automobile accident caused by a car owned by Irene Clayton, driven by her husband Franklin Clayton, and insured by plaintiff-appellant Harleysville Mutual Insurance Company, hereinafter called the company. While that suit was pending the company brought an action for declaratory judgment against the Claytons and the Thomases, and others not involved in this appeal.

The basis of this action was the fact that the company's liability policy on the Clayton car contained an endorsement providing that coverage would not apply when the vehicle was being driven by Franklin Clayton. After the issues were joined, the Thomases moved for a summary judgment declaring the company answerable under its policy. The trial court ordered that the company "be denied all relief and that the action be dismissed on its merits." The case now before us is an appeal by the insurance company from that order.

In Jenkins v. Mayflower Insurance Exchange, 93 Ariz. 287, 380 P.2d 145, after quoting from Schecter v. Killingsworth, 93 Ariz. 273, 380 P.2d 136, we said:

> "Where the basis upon which this act has been declared constitutional is, 'preventing financial hardship and possible reliance upon the welfare agencies,' we cannot constitutionally allow artful distinctions between 'motor vehicle liability policy,' 'automobile liability policy' or 'policy of insurance' to defeat the purpose of the act. To do so would make our opinion in Schecter v. Killingsworth, supra, a sham.
>
> "We hold, therefore, that the omnibus clause is a part of every motor vehicle liability policy, by whatever name it may be called."

The company, while agreeing with Jenkins v. Mayflower Insurance Exchange, supra, contends it is not applicable to

the instant case, because in Mayflower the policy excluded all members of the armed services, while in the instant case the policy excluded only the car-owner's husband. Excluding a large group, says counsel, was completely unreasonable; excluding the husband, who was a known bad driver, on the other hand, was completely reasonable.

This argument—which is the only one advanced by the company—has already been decided by us in Dairyland Mutual Insurance Company v. Andersen, 102 Ariz. 515, 433 P.2d 963. In that case the automobile was owned by the O. K. Meat Packing Company, and the policy excluded only one man—James Andersen. In our opinion we said:

> "Great Basin points to a written endorsement to its policy which provides that its insurance does 'not apply with respect to any claim arising from accidents which occur while any automobile is being operated by' Andersen. From this, Great Basin concludes that it has specifically excluded coverage of any accident occurring while Andersen was driving the Lincoln automobile and, therefore, there is no liability under its policy. Dairyland replies that Great Basin's exclusion of Andersen is illegal and void under our holding in Jenkins v. Mayflower, 93 Ariz. 287, 380 P.2d 145, and this is correct. In Mayflower, we held that the statutory omnibus clause is a part of every motor vehicle liability policy. Great Basin asks us to overrule that case. We were asked to do so in the recent case of Sandoval v. Chenoweth, 102 Ariz. 241, 428 P.2d 98, and we refused. For the reasons stated there, we decline to consider the Mayflower holding further.
>
> "Great Basin argues that even though we do not overrule Mayflower we should not apply it to this case because (a) Mayflower was a case where a whole class was excluded (all members of the armed forces); and (b) in this case the Dairyland policy is in existence and

> the public is thus protected against Andersen being uninsured. We reject these arguments. It is neither desirable nor advisable to engraft exceptions upon the statutory pronouncements now so firmly recognized as the public policy of this jurisdiction. The rider excluding Andersen, being in derogation of the omnibus clause, is void."

Because of the soundness of both Mayflower and Dairyland, it follows that the judgment from which this appeal was taken must be affirmed.

Judgment affirmed.

Ernest W. McFarland, Chief Justice

CONCURRING:

Jesse A. Udall, Vice Chief Justice

Fred C. Struckmeyer, Jr., Justice